

A WILD TIME FOR UNION ORGANIZING

ANALYSIS OF SELECTED RECENT DEVELOPMENTS AT THE NATIONAL LABOR RELATIONS BOARD AND IN UNION ORGANIZING CAMPAIGNS

EXECUTIVE SUMMARY

This paper examines recent tactics used by labor organizations in private sector unionization campaigns, trends in the number of unionization elections, areas of emphasis to be expected from the National Labor Relations Board (NLRB), and other areas of note in the collective bargaining space.

Last summer a new Democratic majority was confirmed to the NLRB, which enforces collective bargaining laws in the private sector. A new general counsel for the Board was confirmed, giving the Biden Administration full control over the NLRB. With new members and a new general counsel, the NLRB will likely shift many of its positions to be more friendly to labor organizations. Other independent agencies may wade deeper into the labor relations space than previously. An example is the Federal Trade Commission, discussed below.

THE NATIONAL LABOR RELATIONS BOARD

In the United States, private sector collective bargaining, including the rules regarding unionization elections, is governed by the National Labor Relations Act (NLRA) a law enforced by the NLRB.¹ The Board has five members who are appointed by the President and confirmed by the U.S. Senate.² They serve term appointments of five years.³ The Board's general counsel is also appointed by the President and confirmed by the Senate and serves a term of four years.⁴ The general counsel has "final authority" regarding the "investigation of charges and issuances of complaints" for unfair labor practices and for the "prosecution of such complaints before the Board."⁵

Unfair labor practices include actions by employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the NLRA.⁶ Labor organizations commit unfair labor practices when they, among other things, "restrain or coerce" employees regarding these rights.⁷

NEW NLRB MEMBERS

In 2021 the U.S. Senate confirmed two new members to the NLRB, Gwynne A. Wilcox, and David M. Prouty.⁸ Wilcox was previously a partner in a labor and employment law firm, an associate general counsel for a local union of the Service Employees International Union (SEIU), and a field attorney for the NLRB.⁹ Prouty was previously general counsel for a SEIU local, general counsel for the Major League Baseball Players Association, and worked for other unions.¹⁰ The NLRB now has a 3-2 Democrat majority.

The Senate also confirmed Jennifer Ann Abruzzo as general counsel.¹¹ Abruzzo was previously counsel for the Communications Workers of America, and before that served on the NLRB for over 20 years including stints as the deputy general counsel and acting general counsel.¹²

In August 2021, Abruzzo issued a memo to the field with instructions on the types of cases that she believes "compel centralized consideration."¹³

These include cases involving:

- employer handbook rules;
- confidentiality provisions in areas such as separation agreements;
- a question on what is protected concerted activity by employees (as well as cases on statements by employers that violate these rights);
- the range of remedies that can be ordered;
- union access to employer properties;

- how union dues are handled in situations where a collective bargaining agreement has expired and what information has to be provided to non-members who are required to pay fees to a union;
- whether an individual is an employee or independent contractor;
- NLRB jurisdiction over religious institutions;
- technical issues related to an employer's duty to recognize and bargain with a labor organization, including card check situations, discussed further below;
- jurisdictional issues with other agencies, and various other cases such as those dealing with the right to strike and picket.¹⁴

Many of these, such as those involving handbook rules, are an Obama-era redux. Here, the previous general counsel and Board attempted to micro-manage what can and cannot be included by an employer in its employee handbooks.

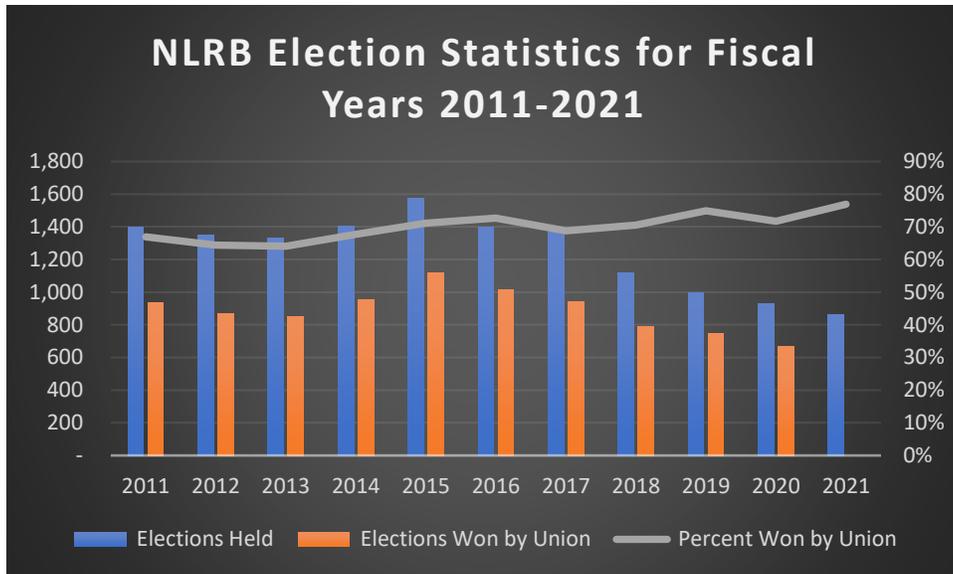
Some of these specifications border on the absurd. Can an employer have a rule in its handbook prohibiting abusive conduct within its workplace? If not, can the employer have a rule in its handbook limiting the amount of abusive conduct so long as that conduct is verbal only in nature and does not involve physical contact? During the Obama era it was difficult to discern the answers to these questions.

The independent contractor issue also was one of significant concern for employees as the previous general counsel and Board attempted, where possible, to shoehorn all workers into an employee relationship – even if many would prefer to be their own bosses and work as contractors.

With new members and a general counsel that are rightly perceived to be union friendly, expect labor organizations to attempt to capitalize with gains in unionization elections

NLRB ELECTION STATISTICS

The high-water mark for the number of representation elections conducted over the last decade was in fiscal year 2015 when the NLRB conducted 1,574.¹⁵ The number has declined every year through fiscal year 2021. Only 862 elections were conducted that year.¹⁶ As shown in the chart below, the percent of cases won by unions has varied, but generally has trended higher over the last decade.¹⁷ In fiscal year 2011 unions won approximately 67 percent of elections.¹⁸ In fiscal year 2021 they won approximately 77 percent.¹⁹



The Board had a Republican majority for most of fiscal years 2017-2021. This may explain part of the decrease in representational elections held during that time, as unions likely viewed the Board to be less friendly to their interests. Unions may have also been more selective in the cases where they sought elections, leading to an increased win rate.

SEND IN THE CELEBRITIES

Celebrity involvement in labor-management issues has long been and will likely continue to be a favored union tactic.

In January, U.S. Senator Bernie Sanders threw his weight behind a strike of workers at a dessert company in L.A. County, California.²⁰ This past December, Sanders joined a picket line in Battle Creek, Michigan for a union strike against Kellogg's. Also active in the effort were other celebrities including actress Susan Sarandon, and the musician Tom Morello from Rage Against the Machine. The latter gave a special performance via live stream and donated a guitar to the union effort.²¹

At a 2017 protest at a Nissan facility in Canton, Mississippi, actor Danny Glover claimed that the company built the factory there because of "weak labor laws" and history in the state regarding "exploitation of workers from slavery through Jim Crow." Sen. Sanders was also present.²² In 2010, Glover was one of 12 individuals arrested after refusing multiple times to step back after crossing a police line at a protest that they were engaged in at the Maryland headquarters of Sodexo, a food service company.²³

Another celebrity who has been active recently is a “rapper and activist” named “Killer Mike.”²⁴

LIMITING EMPLOYER SPEECH

In a union organizing campaign, employers are restricted on what they can and cannot say to their employees regarding the likely outcomes if the employees vote for union representation. Conversely, unions have much greater leeway in what they can say to employees.²⁵ This puts employees at a disadvantage because, on many issues, they can only hear one side of the story.²⁶

Truthful employer speech on the likely effects of unionization is technically permitted under current Board law. However, one of these situations is now subject to the “centralized consideration” that Abruzzo discussed in her August 2021 memo. The situation involves cases where the applicability of a 1985 case, *Tri-Cast*, is at issue.²⁷

This case involved the legality of a statement from an employer regarding how the employer would interact with its employees if the employees voted in a union. Here the employer stated, “We have been able to work on an informal and person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing.”²⁸ After this statement was made, the union lost the election and sought a new election.

The NLRB in its decision stated, “[t]here is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before.”²⁹ Thus, the NLRB declined to order a new election.

The previous NLRB general counsel, Peter B. Robb, in his 2017 memo had instructed that initiatives such as those “seeking to overturn the Board’s *Tri-Cast* doctrine” were no longer in effect.³⁰ Because of Abruzzo’s memo, look for more attempts to overrule the *Tri-Cast* doctrine. This could also mean additional attempts to further limit employer speech in unionization campaigns.

Contrast this with the type of speech that is permitted for unions in the same campaign. Unions can promise all kinds of things such as “elimination of merit reviews,” or “benefits, including job security, wage increases, a variety of health, welfare, and pension benefits, sick leave, and more holidays.”³¹ The rationale justifying this is that “[e]mployees are generally able to understand that a

union cannot obtain benefits automatically by winning an election, but must seek to achieve them through collective bargaining.”³² On the other side, the NLRB warns that, “you [the employer] may not” do things like “[promise] employees benefits if they reject the union.”³³

ELECTRONIC VOTING AND MAILBOX ISSUES

The NLRB, like most entities, made significant adjustments due to the COVID-19 pandemic. While generally the NLRB’s “longstanding policy strongly favors manual elections” (in-person voting), due to the pandemic they have “permitted mail-ballot elections under an ‘extraordinary circumstances’ exception to the manual ballot preference.”³⁴

In the case announcing the standards for how balloting would occur during the pandemic, the then-Republican majority stated that in-person “elections permit in-person supervision of the election, promote employee participation, and serve as a tangible expression of the statutory right of employees to select representatives of their own choosing for the purpose of collective bargaining, or to refrain from doing so.”³⁵ Then-Member, and now Chairman, McFerran, while concurring with the decision, would have gone further and engaged in a wholesale reevaluation of whether in-person voting should be the norm.³⁶

More recently, McFerran, has stated her desire to reevaluate how the Board handles elections that are not conducted in person. “Chairman McFerran believes that it is time for the Board to reevaluate its historic preference for manual elections and to consider expanding and normalizing other ways to conduct elections on a permanent basis, including mail, telephone, and electronic voting,” said a recent NLRB ruling.³⁷

Mail ballot elections are certainly not without issues. There are questions about security, privacy in voting, ballot harvesting, and others. In one recent case, the NLRB had to note the obvious point that, “it is objectionable for a party to engage in mail-ballot solicitation.”³⁸

In a recent unionization election at an Amazon.com facility in Bessemer, Alabama, in-person balloting was not used. Instead, a mail ballot election was ordered.³⁹ Only 738 out of the 3,041 individuals who cast ballots voted for the union and as such it lost by a wide margin.⁴⁰ In the midst of the campaign, at the behest of Amazon, the U.S. Postal Service installed a postal box near the entrance of the Bessemer facility. This seemingly innocuous occurrence along with a sign posted by Amazon that said “SPEAK FOR YOURSELF! MAIL YOUR BALLOT HERE” was deemed to be “objectionable conduct that warrants setting aside the election.”⁴¹ A second election was ordered.⁴² The NLRB ordered that the mailbox be moved to a neutral location, and the union being

unhappy with that decision (they wanted it completely off of the property) sought a review of the order.⁴³

In the political world, Congress is currently considering legislation that would give the NLRB \$5 million to create an electronic voting system.⁴⁴ This, coupled with the Chairman's desire to reevaluate the Board's preference for in-person balloting, could lead to a future new normal where in-person balloting is not used often, if at all. If this occurs look for more legal questions about various aspects of voting by mail to percolate through new NLRB cases.

CARD CHECK/NEUTRALITY AGREEMENTS

In organizing campaigns, unions often prefer to sidestep the private ballot election process conducted by the NLRB. Instead, they attempt to get an agreement from the employer that the employer will accept the union's evidence of majority support from the relevant employees in the form of signed authorization cards.

An agreement that the employer will remain neutral regarding the issue of whether its employees are represented by a union (and not say anything bad about the union) is often part of the package. This means that the employer will not give its side of the story or its point of view to the employees. Instead, the employees will only hear from the union regarding the issue of whether

the employees should choose the union as their exclusive representative. This leaves employees hearing only one side and makes it more difficult for them to exercise an informed choice regarding union representation.

One prominent example of a card check/neutrality agreement is the one that exists between the Ford Motor Company and the United Auto Workers (UAW). This agreement is over 500 pages in length and covers a wide range of subjects from production standards to wash-up time.⁴⁵ In addition to describing in exacting detail how the terms and conditions of employment are governed for current employees, the agreement also has provisions on how the employer will operate in the event of a future organizing campaign. Ford has agreed to remain neutral in any such campaigns.⁴⁶

Ford has also agreed to forgo the employee protections that come from a secret ballot election conducted by the NLRB and will instead recognize the

“Ford and its subsidiaries and affiliates are committed that they will remain neutral during a UAW organizing campaign directed at hourly employees in facilities of Ford and its affiliates or subsidiaries.”

union as the exclusive representative of its employees after a card check is performed.⁴⁷ “Ford, on behalf of itself and its subsidiaries and affiliates, agrees to recognize the UAW as the bargaining representative of hourly employees in an appropriate unit the Union seeks to represent, upon a showing, pursuant to a card check conducted by a third party, that a majority of such employees have expressed their desire to be represented by the Union.”⁴⁸

The agreement also includes provisions giving the union access to “employees in non-work areas, during non-work time.” The union also can request and receive “a list of such employees, their home addresses and job classifications.”⁴⁹

Ford even agreed to a complete gag order on “negative” comments by its personnel regarding the UAW: “Ford, on behalf of itself and its U.S. subsidiaries and affiliates, agrees no agent of Ford Motor Company or any such subsidiary or affiliate will comment in a negative manner about the Union.”⁵⁰

These prior agreements are now at issue as Ford is working to expand in Tennessee, a Right-to-Work state. In October 2021, the Tennessee legislature passed a large incentive package worth approximately \$900 million to lure a new Ford facility to the Memphis area.⁵¹

Legislators, concerned by the card check/neutrality agreement in place between Ford and the UAW, attempted to “insert language that would force any offer to join the United Auto Workers by secret ballot.”⁵² This attempt failed. While it would not affect workers at the new Ford site, another try is underway with the introduction of a bill in the General Assembly that would, among other things, prohibit state incentives from flowing to employers who do not provide their employees information on secret ballot elections.⁵³

That the Ford employees will be unionized, even before any employees are hired seems to be a foregone conclusion to the union. The UAW’s president, Ray Curry, remarking on the situation stated that the union “looks forward to continuing our long-time relationship with Ford” and that they “look forward to reaching out and helping develop this new workforce.”⁵⁴ One of the local UAW presidents, C.L. Smith went further stating, “I can say with some certainty it will be a union facility.”⁵⁵

Given the recent, significant corruption that has been part of the UAW’s senior ranks, individual employees, if given the chance to cast a secret ballot may not be so quick to vote for that union. In 2020, then U.S. Secretary of Labor Eugene Scalia remarked on the corruption stating, “[a] criminal element within the UAW recently betrayed these members’ trust, engaging in bribery, kickback, and embezzlement schemes totaling millions of dollars.”⁵⁶

At least 11 individuals in the UAW leadership were involved in the corruption.⁵⁷ The corruption was so pervasive among UAW leadership that the union is now under a consent order in the U.S. District Court for the Eastern District of Michigan and will be closely monitored.⁵⁸

PROBLEMS WITH CARD CHECK

The core of the problem with card check was summed up by then Ranking Member Kline in a 2007 hearing in the U.S. House of Representatives Committee on Education and Labor regarding these issues. Kline noted that taking away a private ballot election and replacing it with card check means having a system “in which everyone—everyone: a worker’s employer, his coworkers, the union—knows how he or she votes.”⁵⁹

For that hearing, Mike Ivey, a materials handler for Freightliner Custom Chassis Corporation, provided a statement detailing some of the problems he had seen with the UAW’s card check campaign at his employer.⁶⁰ Mr. Ivey stated that the meaning associated with signing a card was misrepresented, that employees were told, “signing a card only certifies that they attended” an offsite meeting.⁶¹ Ivey also stated that they were “offered a free t-shirt if they sign a card.”⁶² Ivey stated that what the employees were “not told is that these cards are a legally binding document, which states that the employee is pro union—thus placing the union one step closer to their goal of complete control of the employees’ workplace life without the employee even realizing it.”⁶³

Ivey then detailed how “relentless” the UAW was in trying to get the cards signed, creating “a hostile work environment, with employees who once were friends who are now at odds with each other.”⁶⁴ The situation went beyond the workplace and followed the employees home. Ivey stated that after the UAW obtained the personal information of employees, workers started receiving calls at home.⁶⁵ Ivey stated that the UAW would not “take ‘no’ for an answer,” that if you said no that “next time they would send someone else,” and that “the only way, it seems, to stop the badgering and pressure is to sign the card.”⁶⁶

Jennifer Jason, a former union organizer for UNITE HERE, testified at the hearing that the number of cards signed was an indication of the effectiveness of the organizer, rather than a reliable indication of support for the union.⁶⁷ Jason stated, “[i]n fact, the ultimate vote count in a secret ballot election is always significantly less than the number of cards actually collected.”

FORTHCOMING NLRB ACTIONS ON CARD CHECK

How the NLRB handles card check issues could be changing soon. The NLRB General Counsel included card check issues in her memo regarding items that “compel centralized consideration.”⁶⁸ The specific situation to be reviewed is when a union presents authorization cards which purport to represent authorization from a majority of the relevant employees, but “the employer is unable to establish a good faith doubt as to majority status.”⁶⁹ The memo then references *Joy Silk Mills, Inc.*, a case from 1949.

In *Joy Silk*, the NLRB held that the Respondent’s (employer’s) “insistence upon an election was not motivated by a good faith doubt of the Union’s majority” and stated, “we are convinced that the real reason the Respondent rejected the Union’s request... [the request to recognize the union without a NLRB-conducted election] was to gain time within which to undermine the Union’s support.”⁷⁰ Thus, the NLRB held that the employer’s refusal to bargain with the union was an unfair labor practice that violated NLRA Sec. 8(a)(5).⁷¹ This section of the NLRA makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.”⁷² As a remedy, the NLRB ordered the employer to bargain collectively with the union.⁷³

Subsequently, the NLRB’s practice has been that an employer may generally decline to accept a card check and instead insist on a Board-conducted election.⁷⁴ There are exceptions, but this has been the general rule.

If the NLRB goes back to the standard under *Joy Silk*, and this change survives the inevitable legal challenge that would occur, then employers commit an unfair labor practice if they, without a good faith belief that the union does not have authorization from a majority of its employees, decline to bargain with the union when presented with a card check. This puts the employer in the position of being on the receiving end of an order from the NLRB that it bargain with the union. This potential change could result in more employers agreeing to accept card checks and would also create a new unfair labor practice that could trip up unwary employers.

CHANGE ANTITRUST LAW

There is a public policy strategy for organizations when confronted with an impediment to their goals— they seek changes to the law to increase the chance of success. Labor organizations and their allies pursue this strategy on a regular basis. For example, at the behest of the labor movement, the U.S. Congress is currently considering legislation, the “Protecting the Right to Organize Act of 2021, H.R. 842, which would add a number of changes to federal law governing collective bargaining and other labor issues.”⁷⁵

Attempts to change the law are also targeted at administrative law developed and enforced by the Executive Branch and independent agencies. A recent example from the Federal Trade Commission (FTC) is illustrative.

In June of 2021, the U.S. Senate confirmed Lina M. Khan, President Biden's nominee to be a Commissioner on the FTC.⁷⁶ Upon confirmation, Khan was designated as the FTC Chair.⁷⁷ Khan's nomination and confirmation sparked significantly divided comments. Sen. Mike Lee, the Ranking Member on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, called her nomination "deeply troubling," because he believes her positions on antitrust issues are "wildly out of step with a prudent approach to the law."⁷⁸

On the other side, Marc Perrone, president of the United Food and Commercial Workers International Union (UFCW), praised her confirmation because it sent "a clear message that this White House is committed to holding companies like Amazon, Walmart, Instacart, and DoorDash accountable to their workers..."⁷⁹ Perrone added, "Khan understands the urgent need for strong antitrust enforcement that will help restore the balance of power between corporations and the American people."

Khan came onto the national antitrust scene due to a paper she authored while at Yale Law School regarding Amazon.com.⁸⁰ In this paper, Khan "argues that the current framework in antitrust—specifically its pegging competition to 'consumer welfare,' defined as short-term price effects—is unequipped to capture the architecture of market power in the modern economy."⁸¹

She further argued, "[w]e cannot cognize the potential harms to competition posed by Amazon's dominance if we measure competition primarily through price and output. Specifically, current doctrine underappreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive."⁸²

Since joining the FTC, Khan has also advocated her views regarding the intersection of antitrust issues and the labor market. In a recent letter to the U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law, Khan notes that the exemptions that remove labor organizing from antitrust law apply only "to workers formally classified as employees," and do not apply to others, such as independent contractors.

She clearly believes that all organizing activities should be exempt and urges Congress to enact legislation "clarifying that labor organizing by workers regarding the terms and conditions of their work is outside the scope of the

federal antitrust statutes, regardless of whether the worker is classified as an employee.”⁸³

If Congress did make these suggested changes, the result would be significant, upending established antitrust law.

CONCLUSION

It’s a wild time in the land of union organizing, collective bargaining, and surrounding issues. New Democratic majorities on the NLRB and other federal bodies mean changes in how these entities have done business. While a few of the current issues have been discussed in this paper, many others exist, and more are likely to emerge in the near future.

Employees are likely to get squeezed in the process as they are often the “odd man out” when it comes to collisions between unions and employers. Don’t look to the current NLRB to focus as much on employees as it does on employers and unions.

ENDNOTES

¹ 29 U.S.C. § 151-169.

² 29 U.S.C. § 153.

³ *Id.*

⁴ 29 U.S.C. § 153(d).

⁵ *Id.*; 29 U.S.C. § 160.

⁶ 29 U.S.C. § 158(a).

⁷ 29 U.S.C. § 158(b).

⁸ Roll Call Vote No. 282, U.S. Senate, July 28, 2021. Available online at: https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00282 (accessed February 21, 2022); Roll Call Vote No. 284, U.S. Senate, July 28, 2021. Available online at: https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00284 (accessed February 21, 2022).

⁹ Biography of Gwynne A. Wilcox, National Labor Relations Board. Available online at: <https://www.nlr.gov/bio/gwynne-a-wilcox> (accessed February 21, 2022).

¹⁰ Biography of David M. Prouty, National Labor Relations Board. Available online at: <https://www.nlr.gov/bio/david-m-prouty> (accessed February 21, 2022).

¹¹ Roll Call Vote 273, U.S. Senate, July 21, 2021. Available online at: https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00273 (accessed February 21, 2022).

¹² Biography of Jennifer A. Abruzzo, National Labor Relations Board. Available online at: <https://www.nlr.gov/bio/general-counsel> (accessed February 21, 2022).

¹³ Memorandum GC 21-04, Mandatory Submissions to Advice, Office of the General Counsel, National Labor Relations Board, August 12, 2021. Available online at: <https://apps.nlr.gov/link/document.aspx/09031d4583506e0c> (accessed February 21, 2022).

¹⁴ *Id.*

¹⁵ NLRB data for representation petition cases, undated. Available online at: <https://www.nlr.gov/reports/nlr-case-activity-reports/representation-cases/intake/representation-petitions-rc> (accessed February 21, 2022).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Caitlin Hernández, *Bernie Sanders Calls Offer To End Local Dessert Worker Strike 'Pathetic,' Backs Union*, LAist, January 5, 2022. Available online at: <https://laist.com/news/bernie-sanders-calls-offer-to-end-dessert-worker-strike-pathetic-backs-union> (accessed February 21, 2022).

²¹ *Sen. Bernie Sanders rallies in Battle Creek as Kellogg strike continues*, MLive, December 17, 2021. Available online at: <https://www.mlive.com/public-interest/2021/12/sen-bernie-sanders-rallies-in-battle-creek-as-kellogg-strike-continues.html> (accessed February 21, 2022).

²² *Actor and Activist Danny Glover Joins Protests at Nissan Plant*, The Takeaway, March 6, 2017. Available online at: <https://www.wnycstudios.org/podcasts/takeaway/segments/actor-and-political-activist-joins-protest-nissan-plant> (accessed February 21, 2022).

²³ Q6 News, April 16, 2010. Available online at: https://www.khq.com/news/actor-danny-glover-others-arrested/article_d03fc232-c44a-552d-b056-f3d1dd9a90a6.html (accessed February 21, 2022).

²⁵ “The prohibition against employer promises during representation campaigns is so well-entrenched that it has become an axiomatic principle of labor law: Employers cannot make promises to employees about the consequences of a ‘no’ vote in a representation campaign, while unions are free to make any promises about the benefits employees purportedly can achieve through collective bargaining if the union wins the election.” Daniel V. Johns, PROMISES, PROMISES: RETHINKING THE NLRB’S DISTINCTION BETWEEN EMPLOYER AND UNION PROMISES DURING REPRESENTATION CAMPAIGNS, U. Pa Journal of Business and Employment Law, Vol 10:2 (2008) at p. 434.

²⁶ “Do employees make a more informed choice while only hearing the promises of the union? The answer to these questions is clearly no. Employee free choice in an election is not supported by allowing one side of an election to make promises while covering the mouth of the other side.” Daniel V. Johns, *supra*, at p. 453.

²⁷ Memorandum GC 21-04, *supra*, at p. 8.

²⁸ *Tri-Cast, Inc. and International Molders and Allied Workers Union, AFL-CIO-CLC*, 274 NLRB 377 (1985). Available online at: <https://apps.nlr.gov/link/document.aspx/09031d45801b2106> (accessed February 21, 2022).

²⁹ *Id.*

³⁰ Memorandum GC 18-02, Mandatory Submissions to Advice, National Labor Relations Board, Office of the General Counsel, December 1, 2017. Available online at: <https://apps.nlr.gov/link/document.aspx/09031d458262a31c> (accessed February 21, 2022).

³¹ *Acme Wire Products Corporation and Dura-Coat, Inc and Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 224 NLRB 701 (1976). Available online at: <https://apps.nlr.gov/link/document.aspx/09031d45800ae76c> (accessed February 21, 2022).

³² *Id.*

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- ³³ *Interfering with employee rights (Section 7 & 8(a)(1))*, National Labor Relations Board. Available online at: <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1> (accessed February 21, 2022).
- ³⁴ *NLRB Establishes Standards for Mail-and Manual-Ballot Representation Elections During the COVID-19 Pandemic*, National Labor Relations Board, November 9, 2020. Available online at: <https://www.nlr.gov/news-outreach/news-story/nlr-establishes-standards-for-mail-and-manual-ballot-representation> (accessed February 21, 2022).
- ³⁵ *Aspirus Keweenaw and Michigan Nurses Association*, National Labor Relations Board, 370 NLRB No. 45, November 9, 2020, Slip Op. at 1. Available online at: <https://apps.nlr.gov/link/document.aspx/09031d45832bd759> (accessed February 21, 2022).
- ³⁶ *Aspirus Keweenaw and Michigan Nurses Association*, *supra*, Slip Op. at 8.
- ³⁷ *Professional Transportation, Inc. and United Electrical, Radio, and Machine Workers of America (U.E.), Local 1077*, National Labor Relations Board, 370 NLRB No. 132, June 9, 2021, at footnote 10. Available online at: <https://apps.nlr.gov/link/document.aspx/09031d458346c726> (accessed February 21, 2022).
- ³⁸ *Professional Transportation, Inc.*, *supra*. Slip Op. at 3.
- ³⁹ “The election will be conducted by United States mail.” Decision and Direction of Election, *Amazon.com Services, LLC and Retail, Wholesale and Department Store Union*, Case 10-RC-269250, National Labor Relations Board, Region 10, January 15, 2021, at p. 10. Available online at: <https://apps.nlr.gov/link/document.aspx/09031d458334974b> (accessed February 21, 2022).
- ⁴⁰ Tally of Ballots, *Amazon.com Services, LLC and Retail, Wholesale and Department Store Union*, Case 10-RC-269250, National Labor Relations Board, April 9, 2021. Available online at: <https://apps.nlr.gov/link/document.aspx/09031d4583410265> (accessed February 21, 2022).
- ⁴¹ Decision and Direction of Second Election, *Amazon.com Services, LLC and Retail, Wholesale and Department Store Union*, Case 10-RC-269250, National Labor Relations Board, Region 10, November 29, 2021, at p. 3 and p. 14. Available online at: <https://apps.nlr.gov/link/document.aspx/09031d458350f488> (accessed February 21, 2022).
- ⁴² Decision and Direction of Second Election, *supra*.
- ⁴³ Request for Review of Regional Director’s Decision and Order, *Amazon.com Services, LLC and Retail, Wholesale and Department Store Union*, Case 10-RC-269250, National Labor Relations Board, Region 10, January 25, 2022. Available online at: <https://apps.nlr.gov/link/document.aspx/09031d4583673e76> (accessed February 21, 2022).
- ⁴⁴ James Sherk, *Big Government Reconciliation Bill’s Labor Provisions Undermine Workers’ Freedom*, Institute for the American Worker and America First Policy Institute, September 2021, at p. 9. Available online at: <https://i4aw.org/wp-content/uploads/2021/09/Big-Government-Reconciliation-Labor-Provisions-Undermine-Workers-Freedom-2.pdf> (accessed February 21, 2022).
- ⁴⁵ Letters of Understanding Between UAW and the Ford Motor Company, Volume IV-A, Related to: Collective Bargaining Agreement, October 30, 2019. Hereinafter, Letters of

Understanding. Available online at: <https://uaw.org/wp-content/uploads/2020/08/volume-4a.pdf> (accessed February 21, 2022).

⁴⁶ Letters of Understanding, *supra*, at p. 482.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ “Further, Ford and its subsidiaries and affiliates will, if requested by the Union, give the Union limited access to such employees in non-work areas, during non-work time provided such access is not disruptive to the operations of the facility. In addition, we will provide the union, upon request, with a list of such employees, their home addresses and job classifications.” Letters of Understanding, *supra*, at p. 483.

⁵⁰ *Id.*

⁵¹ *Tennessee Lawmakers Ok \$900M Ford Incentive Package*, THE TENNESSEE TRIBUNE, October 21, 2021. Available online at: <https://tntribune.com/tennessee-lawmakers-ok-900m-ford-incentive-package/> (accessed February 21, 2022).

⁵² *Id.*

⁵³ HB1865, Tennessee General Assembly, January 19, 2022. Available online at: <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1856&ga=112> (accessed February 21, 2022).

⁵⁴ *STATEMENTS ON FORD INVESTMENTS IN TENNESSEE AND KENTUCKY CREATING ABOUT 11,000 COMBINED JOBS*, United Auto Workers, September 27, 2021. Available online at: <https://uaw.org/statements-ford-investments-tennessee-kentucky-creating-11000-combined-jobs/?view-original-redirect=1> (accessed February 21, 2022).

⁵⁵ Sam Stockard, *UAW Official Has No Doubt Ford Plant Will Be Union Facility*, TENNESSEE LOOKOUT, October 8, 2021. Available online at: <https://patch.com/tennessee/across-tn/uaw-official-has-no-doubt-ford-plant-will-be-union-facility> (accessed February 21, 2022).

⁵⁶ *STATEMENT BY U.S. SECRETARY OF LABOR EUGENE SCALIA ON UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA CONSENT ORDER*, U.S. Department of Labor, December 14, 2020. Available online at: <https://www.dol.gov/newsroom/releases/olms/olms20201214> (accessed February 21, 2022).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Strengthening America’s Middle Class Through the Employee Free Choice Act*, U.S. House of Representatives, Subcommittee on Health, Employment, Labor and Pensions, February 8, 2007, at p. 3, statement of Ranking Member Kline. Available online at: <https://www.govinfo.gov/content/pkg/CHRG-110hhr32906/pdf/CHRG-110hhr32906.pdf> (accessed February 21, 2022).

⁶⁰ *Strengthening America's Middle Class Through the Employee Free Choice Act*, *supra*, at p. 4, prepared statement of Mike Ivey.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Strengthening America's Middle Class Through the Employee Free Choice Act*, *supra*, at p. 5, prepared statement of Mike Ivey.

⁶⁷ *Strengthening America's Middle Class Through the Employee Free Choice Act*, *supra*, at p. 30, statement of Jennifer Jason.

⁶⁸ Memorandum GC 21-04, Mandatory Submissions to Advice, *supra*.

⁶⁹ *Id.*, at 7.

⁷⁰ *In the Matter of Joy Silk Mills, Inc. and United Textile Workers of America, A.F.L.*, 85 NLRB 1263, 4-5 (1949).

⁷¹ *Joy Silk*, *supra*, at 1265.

⁷² 29 U.S.C. § 158(a)(5).

⁷³ *Joy Silk*, *supra*, at 1265.

⁷⁴ "Relying on these three assertions, the Board asks us to approve its current practice, which is, briefly, as follows. When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under § 9(c)(1)(b)." *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 91 (1969).

⁷⁵ For more information on the Protecting the Right to Vote Act of 2021 and its likely effects on union organizing, see, Nathan Paul Mehrens, *The PRO Act and Union Finances*, Institute for the American Worker, April 2021. Available online at: <https://i4aw.org/wp-content/uploads/2021/05/The-Pro-Act-and-Union-Finances-1.pdf> (accessed February 21, 2022).

⁷⁶ Roll Call Vote No. 233, U.S. Senate, June 15, 2021. Available online at: https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00233 (accessed February 21, 2022).

⁷⁷ *Lina M. Khan Sworn in as Chair of the FTC*, Federal Trade Commission, June 15, 2021. Available online at: <https://www.ftc.gov/news-events/press-releases/2021/06/lina-m-khan-sworn-chair-ftc> (accessed February 21, 2022).

⁷⁸ Andrew Ross Sorkin, Jason Karaian, Michael J. de la Merced, Lauren Hirsch, and Ephrat Livni, *The Rise of an Antitrust Pioneer*, THE NEW YORK TIMES, March 10, 2021. Available online at: <https://www.nytimes.com/2021/03/10/business/dealbook/lina-khan-antitrust.html> (accessed February 21, 2022).

⁷⁹ *UFCW: Biden FTC Appointee Strong Voice for Workers Ready to Hold Tech and Gig Economy Companies Accountable*, United Food and Commercial Workers International Union, June 16, 2021. Available online at: <https://www.ufcw.org/press-releases/ufcw-biden-ftc-appointee-strong-voice-for-workers-ready-to-hold-tech-and-gig-economy-companies-accountable/> (accessed February 21, 2022).

⁸⁰ Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. No. 3, pp. 564- 907, January 2017. Available online at: <https://www.yalelawjournal.org/note/amazons-antitrust-paradox> (accessed February 21, 2022).

⁸¹ *Id.*, at p. 170.

⁸² *Id.*

⁸³ Letter from Federal Trade Commission Chair Khan to the Chair and Ranking Member of the U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law, September 28, 2011. Available online at: https://www.ftc.gov/system/files/documents/public_statements/1596916/letter_to_cicilline_and_buck_for_sept_28_2021_hearing_on_labor_antitrust.pdf (accessed February 21, 2022).

